

***DISTRICT OF MAINE***

***Docket No. 02-175-P-H***

summary judgment. Plaintiff's Response to Defendant's Motion to Exclude the Expert Testimony of Conrad A. Kappel ("Kappel Opposition") (Docket No. 10) at 1-2; Defendant's Reply Memorandum in Support of its Motion to Exclude the Expert Testimony of Conrad A. Kappel, etc. (Docket No. 14) at 2. I will accordingly discuss the motions together.

### **I. Summary Judgment Standard**

Summary judgment is appropriate only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant. By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party.'" *Navarro v. Pfizer Corp.*, 261 F.3d 90, 93-94 (1st Cir. 2001) (quoting *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995)).

The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Nicolo v. Philip Morris, Inc.*, 201 F.3d 29, 33 (1st Cir. 2000). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, the nonmovant must "produce specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue." *Triangle Trading Co. v. Robroy Indus., Inc.*, 200 F.3d 1, 2 (1st Cir. 1999) (citation and internal punctuation omitted); Fed. R. Civ. P. 56(e). "As to any essential factual element of its claim on which the nonmovant would bear the burden of proof at trial, its failure to come forward with sufficient evidence to generate a trialworthy issue

warrants summary judgment to the moving party.” *In re Spigel*, 260 F.3d 27, 31 (1st Cir. 2001) (citation and internal punctuation omitted).

## **II. Factual Background**

The parties’ submissions pursuant to this court’s Local Rule 56 include the following undisputed material facts appropriately supported by citations to the summary judgment record.

CCI was a small contractor based near Bangor, Maine. Defendant’s Statement of Material Facts Not in Dispute, etc. (“Defendant’s SMF”) (Docket No. 6) ¶ 1; Plaintiff RLI Insurance Company’s Response to Defendant Berry Dunn McNeil & Parker’s Statement of Material Facts Not in Dispute (“Plaintiff’s Responsive SMF”) (Docket No. 13) ¶ 1. Its business consisted primarily of excavation and installation and repair of sewer and water lines. *Id.* It had been in business since 1945 and under the control of Edward Campbell since 1983. *Id.* For most of the years since Campbell assumed control of CCI, the defendant had prepared annual reviews of CCI’s financial statements at the end of each fiscal year. *Id.* ¶ 2. CCI’s fiscal year ended on March 31. *Id.* ¶ 3. The defendant provided accounting services to CCI for almost twenty years. Plaintiff RLI Insurance Company’s Statement of Additional Facts Not in Dispute (“Plaintiff’s SMF”) (included in Docket No. 13, starting at page 7) ¶ 43; Defendant’s Local Rule 56(D) Statement of Material Facts Submitted in Support of Its Motion for Partial Summary Judgment [sic] (“Defendant’s Responsive SMF”) (Docket No. 16) ¶ 43.

The defendant prepared reviews for the fiscal years ending March 31, 1999 and March 31, 2000. Defendant’s SMF ¶ 4; Plaintiff’s Responsive SMF ¶ 4. These were reviews, not audits, and were governed by the AICPA Statement on Standards for Accounting and Review Services (“SSARS”) and the AICPA Code of Professional Conduct. *Id.* ¶ 5. The “Accountants Review Report” accompanying the reviewed statements includes the following statement:

A review consists primarily of inquiries of company personnel and analytical procedures applied to financial data. It is substantially less in scope than an audit in accordance with generally accepted auditing standards, the objective of which is the expression of an opinion regarding the financial statements taken as a whole. Accordingly, we do not express such an opinion.

*Id.* ¶ 8. At some time, the plaintiff became CCI's bonding company. *Id.* ¶ 9. In the course of that relationship, CCI provided the reviews prepared by the defendant to the plaintiff. *Id.* At the time it prepared the 1999 and 2000 reviews, the defendant was not aware that CCI had provided it with inaccurate information. Defendant's SMF ¶ 10.<sup>1</sup> In late January 2001 Campbell notified James Maynard, the principal of the defendant with whom he worked, that CCI had been providing the defendant with false information for the 1999 and 2000 reviews. Defendant's SMF ¶ 11; Plaintiff's Responsive SMF ¶ 11. Campbell also notified RLI at this time about what he had done. *Id.* CCI used several techniques to overstate its financial condition; one technique involved overstating accounts receivable by moving invoices issued in one period to an earlier period. Plaintiff's SMF ¶ 47; Defendant's Responsive SMF ¶ 47. Upon receiving the information from Campbell, the plaintiff retained the defendant to prepare an updated financial statement for the year 2000. Defendant's SMF ¶ 12.<sup>2</sup>

The plaintiff claims damages for payments made pursuant to six bonds issued between 1998 and 2000. Defendant's SMF ¶ 13; Plaintiff's Responsive SMF ¶ 13. The plaintiff attributes the following damages to the following bonds: (i) the Town of Monson bond (No. SSB-291221), with an effective date of March 16, 2000 — \$67,256.04; (ii) the Brewer Water District bond (No. SSB-252636), with an effective date of September 24, 1999 — \$112,984.48; and (iii) the Town of Milford

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<sup>1</sup> The plaintiff purports to deny this paragraph of the defendant's statement of material facts "because the citations do not support the tendered proposition." Plaintiff's Responsive SMF ¶ 10. In fact, the citations do support the proposition as presented above in a slightly modified version. Deposition of Edward A. Campbell ("Campbell Dep.") (Exh. 6 to Defendant's SMF) at 22-23, 93.

<sup>2</sup> The plaintiff purports to deny this paragraph of the defendant's statement of material facts "because the citations do not support the tendered proposition." Plaintiff's Responsive SMF ¶ 12. The citations do support that portion of the paragraph repeated here. (continued on next page)

bond (No. SSB-0252603), with an effective date of August 20, 1999 — \$10,752.11. *Id.* ¶¶ 17-20. The plaintiff contends that if the defendant had completed its 1999 review and reported the accounts receivable accurately, the Accountant’s Review Report would have indicated that CCI suffered a significant loss (approximately \$170,000); the plaintiff would not have issued additional bonds to CCI if it had known that CCI had a significant loss for the period ending March 1999. *Id.* ¶ 40. Assuming an overstatement in the amount posited by the plaintiff, the 1999 review would still have reflected positive retained earnings and a positive shareholder’s equity. *Id.* ¶ 41.

### **III. Discussion**

#### **A. Kappel’s Testimony**

The plaintiff relies heavily on the affidavit and deposition testimony of Kappel both in its response to the defendant’s statement of material facts and in its own statement of material facts. Plaintiff’s Responsive SMF ¶¶ 6-7, 26-39, 41-42; Plaintiff’s SMF ¶¶ 44-45, 51, 59-70. All but two of the paragraphs of the defendant’s statement of material facts that mention Kappel are disputed by the plaintiff. Defendant’s SMF ¶¶ 26-39, 42; Plaintiff’s Responsive SMF ¶¶ 26-39, 42. The undisputed paragraphs merely state that Kappel does not offer any opinion concerning reviews of CCI performed before 1999 and that, even were Kappel’s testimony concerning an alleged overstatement in the 1999 review accepted, the review would still have reflected positive retained earnings and shareholder’s equity. *Id.* ¶¶ 16, 41. The plaintiff has moved to strike paragraphs 26-39 of the defendant’s statement of material facts, Plaintiff’s Responsive SMF ¶¶ 26-39, and the defendant has moved to strike the plaintiff’s response to paragraph 26 of its statement of material facts and paragraphs 45-46, 48-50 and 52-71 — indeed, all but four paragraphs — of the plaintiff’s statement of material facts, Defendant’s Responsive SMF ¶¶ 26, 45-46, 48-50 & 52-71.

The disputed paragraphs of the defendant's statement of material facts dealing with Kappel were clearly intended to serve as the basis for its motion to exclude portions of his testimony. The defendant contends that Kappel's testimony with respect to the 1999 review is "based entirely on unsupported assumption and speculation, fails to satisfy Rule 702's helpfulness standard, and is neither relevant nor reliable pursuant to *Daubert*." Kappel Motion at 2.

The defendant does not challenge Kappel's qualifications or contend that the proposed subject matter of his testimony does not concern scientific, technical or other specialized knowledge. *See Bogosian v. Mercedes-Benz of N. Am., Inc.*, 104 F.3d 472, 276 (1st Cir. 1997). The defendant's motion concerns the court's gatekeeping function: "to ascertain whether the testimony is helpful to the trier of fact, *i.e.*, whether it rests on a reliable foundation and is relevant to the facts of the case." *Id.* *See also* Fed. R. Evid. 702: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert . . . may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data . . . ."

The defendant asserts that Kappel's opinion that the defendant negligently prepared the 1999 review is inadmissible because "it is based solely upon the unsupported assumption or speculation that the 1999 review is overstated simply because the 2000 review was." Kappel Motion at 2-3. It contends that Kappel "apparently *assumes* that the 1999 review overstated prepaid job costs and accounts receivable because those areas were overstated in the 2000 review." *Id.* at 3 (emphasis in original). In support of its position the defendant quotes Kappel's deposition testimony to the effect that he does not know by how much the 1999 prepaid job costs are overstated but only that "there was a potential overstatement" of such costs and that he selected one account receivable, in the amount of \$240,000, which he believed was in fact billed in December 1998, a receivable which he has not

verified and for which he has not sought a requisition or an invoice. *Id.* at 3-4 & nn. 5-7. The plaintiff responds that Kappel “has identified one clear area of overstatement in the March 1999 financial statements,” a discrepancy between the accounts receivable aging that CCI provided to the defendant and CCI’s actual general ledger. Plaintiff RLI Insurance Company’s Objection to Defendant Berry Dunn McNeil & Parker’s Motion for Partial Summary Judgment (“Summary Judgment Opposition”) (Docket No. 12) at 8. The plaintiff states that this discrepancy “suggests that [CCI] may have deliberately manipulated at least one of these records.” *Id.* This is a reference to the \$240,000 charge mentioned in the defendant’s motion. The plaintiff also points out that “various witnesses . . . testified that [CCI] overstated its financial statements for several years prior to March 2000, including the period in which the March 1999 review was issued.” *Id.*<sup>3</sup> Kappel testified that professional standards require an accountant to question this discrepancy and to perform additional procedures to determine the reliability of the information. Plaintiff’s SMF ¶ 64.<sup>4</sup> This evidence is obviously relevant and would be helpful to a factfinder. These grounds for the motion to exclude this portion of Kappel’s testimony will not be considered further.

The defendant also contends that Kappel’s testimony that he obtained copies of “the requisitions” and that CCI “did not issue a \$240,000 invoice to the Brewer Water District in December 1998,” Plaintiff’s SMF ¶¶ 65-66, is not admissible because Kappel “did not testify at

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<sup>3</sup> The plaintiff cites only paragraph 57 of its statement of material facts in support of this argument. Summary Judgment Opposition at 8. That paragraph refers to the testimony of two individuals, not “various.” The defendant objects to the paragraph as irrelevant and asks the court to strike it. Defendant’s Responsive SMF ¶ 57. The subject matter of the paragraph is clearly relevant; the objection is overruled and the motion to strike is denied. The defendant also objects to the cited testimony of James R. Maynard as hearsay and asks the court to strike those citations. *Id.* The statements at issue are hearsay, Deposition of James R. Maynard (Exh. 2 to Plaintiff’s SMF) at 28-30; 30(b)(6) Deposition of Berry, Dunn, McNeil and Parker, LLC (James R. Maynard) (Exh. 3 to Plaintiff’s SMF) at 162, and the objection as to those citations is sustained. Since the factual assertion is supported by the remaining citation given in support of the paragraph, this ruling makes no difference with respect to the current motion.

<sup>4</sup> The defendant objects to this paragraph of the plaintiff’s statement of material facts on the grounds that it “consists of argument” and “does not contain a separate, short concise [sic] statement of material facts, as required by Local Rule 56(c).” Defendant’s Responsive SMF ¶ 64. It asks the court to strike the paragraph. *Id.* The objections are without merit and are overruled; the motion to strike is denied.

deposition that he obtained all of the [sic] Campbell Construction's requisitions or invoices relating to the bonds at issue or even all of Campbell Construction's requisitions or invoices to the Brewer Water District" and "for the same reasons as in Berry Dunn's reply to RLI's response to Paragraph 33." Defendant's Responsive SMF ¶¶ 65-66. In its lengthy "response" to the plaintiff's opposition to paragraph 33 of its own statement of material facts, the defendant contends that the plaintiff "does not lay the proper foundation for this statement, in that RLI does not demonstrate, using admissible record evidence, that Mr. Kappel reviewed all of Campbell Construction's invoices to determine that no such \$240,000 existed;" the invoices and general ledger themselves are the best evidence; the testimony is "neither relevant nor reliable;" the statements in Kappel's affidavit purport to be statements of fact rather than opinion and the affidavit does not state that it is made on personal knowledge; and Kappel's affidavit impermissibly contradicts his deposition testimony. Defendant's Responsive SMF ¶ 33.

The nature of expert testimony is to draw information from other evidence; the "best evidence" rule does not require that the ledgers and invoices themselves be presented.

Rule 703 permits expert opinion testimony to be based on matters that have been or would be excluded under certain other provisions of the Evidence Rules. For example, courts have held that Rule 703 permits experts to base opinion testimony on evidence that is inadmissible under the hearsay, authentication and best evidence rules.

29 C. Wright & V. Gold, *Federal Practice & Procedure* § 6273 (1997) at 311. The party opposing the testimony can present those documents in support of cross-examination or in opposition to summary judgment if it wishes to do so. *See United States v. 5139.5 Acres of Land*, 200 F.2d 659, 661-62 (4th Cir. 1952).

The proposed testimony is quite relevant; the contention that it is not obviously lacks merit.

Kappel's affidavit expands upon rather than contradicts his deposition testimony.



When an interested witness has given clear answers to unambiguous questions [at deposition], he cannot create a conflict and resist summary judgment with an affidavit that is clearly contradictory, but does not give a satisfactory explanation of why the testimony is changed.

*Colantuoni v. Alfred Calcagni & Sons, Inc.*, 44 F.3d 1, 4-5 (1st Cir. 1994). “[L]apse of memory, new sources of information or other events can often explain a revision of testimony.” *Hernandez-Loring v. Universidad Metropolitana*, 233 F.3d 49, 54 (1st Cir. 2000). Additional information may be provided by an affidavit submitted in opposition to a motion for summary judgment so long as the affiant did not testify at deposition that no such additional information existed. *Elwell v. Conair, Inc.*, 145 F.Supp.2d 79, 85 (D. Me. 2001). Here, the defendant points to Kappel’s deposition testimony that he found no requisition or invoice for \$240,000 among those given to him and the statement in Kappel’s affidavit that no such invoice was issued. Defendant’s Responsive SMF ¶ 33. On their faces, these two statements are not contradictory. No further analysis is necessary.

Of the cited paragraphs of Kappel’s affidavit, paragraph 12 and the first sentence of paragraph 15 are clearly within Kappel’s personal knowledge. The jurat of the affidavit states that Kappel swore that the statements made “are true based on his personal knowledge, information, and belief,” Affidavit of Conrad A. Kappel (Exh. 1 to Plaintiff’s SMF) at [6]; that is sufficient for purposes of Rule 56. The second sentence of paragraph 15 is an inference drawn from facts, which an expert witness is permitted to draw from facts within his personal knowledge, as Kappel does here. Paragraph 19 is a statement of opinion to which the objection is irrelevant. The defendant’s remaining objections go to the weight of Kappel’s testimony rather than its admissibility.

The defendant has not shown that Kappel’s testimony is based only on assumption and speculation and hence unreliable. The motion to exclude Kappel’s testimony with respect to the 1999 review is denied.

## **B. Summary Judgment**

The defendant's motion for partial summary judgment is based primarily on the assertion that Kappel's testimony concerning the 1999 review must be excluded. Defendant's Motion for Partial Summary Judgment, etc. ("Summary Judgment Motion") (Docket No. 5) at 5-10. The defendant's arguments concerning perceived inadequacies in Kappel's testimony and the plaintiff's other evidence, or lack thereof, go to the weight of the disputed evidence, not its admissibility.<sup>5</sup> The sole exception is the claim on Bond No. SSB-214615, concerning which the plaintiff acknowledges that it has not presented sufficient evidence. Summary Judgment Opposition at 6 n.1. Summary judgment should accordingly be entered on that claim only.

The defendant also argues, in conclusory fashion, that the plaintiff "has failed to demonstrate that any action or inaction on Berry Dunn's part proximately caused RLI to issue the bonds in question or to incur any damages." Summary Judgment Motion at 2, 5, 9-10. To the extent that this argument has been sufficiently presented, it also fails. The plaintiff points out that, in its answers to interrogatories, it stated that, if the defendant had reviewed the 1999 figures appropriately, it would have shown a \$170,000 loss and the plaintiff would not have issued additional bonds if it had been aware of such a loss. Summary Judgment Opposition at 11-12; Plaintiff's SMF ¶¶ 70-71.<sup>6</sup> The amount of its claimed damages is presumably the amount of its loss on those bonds. Contrary to the

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<sup>5</sup> For example, the proper scope of an accounting review, as distinct from an audit, is very much in dispute. *E.g.*, Defendant's SMF ¶ 8, Plaintiff's Responsive SMF ¶ 8; Plaintiff's SMF ¶¶ 44, 64, Defendant's Responsive SMF ¶¶ 44, 64.

<sup>6</sup> The defendant objects to these paragraphs of the plaintiff's statement of material facts, contending that they are irrelevant and "not supported by admissible record citations." Defendant's Responsive SMF ¶¶ 70-71. The information included in these paragraphs is clearly relevant. The first basis asserted for the contention that the supporting citations are inadmissible — that Kappel's testimony regarding the \$240,000 invoice is inadmissible — has already been rejected as discussed above. The second basis — that Barton W. Davis has impermissibly changed his deposition testimony through the interrogatory answers which he signed — also fails. Assuming *arguendo* that the case law set forth above in my discussion of Kappel's affidavit and deposition testimony also applies to comparisons between deposition testimony and interrogatory responses, the only deposition testimony identified by the defendant is found at pages 102 and 140 of Davis's deposition. Defendant's SMF ¶¶ 22-23. Davis did testify that he had no other evidence that the 1999 review was unreliable beyond what he had testified to and that he did not know what numbers were inaccurate or by how much they were inaccurate. *Id.* The interrogatory answers at issue, Defendant's Responsive SMF ¶ 70, in no way contradict any of these statements. Plaintiff RLI Insurance Company's Answers to Defendant's Interrogatories (Exh. 8 to Plaintiff's SMF) ¶¶ 15-16. The defendant's remaining objections to these paragraphs go to the weight rather than the admissibility of the evidence. The defendant's motion to strike these two paragraphs of the plaintiff's statement of material facts is denied.

defendant's argument, Summary Judgment Motion at 10 n.10, the plaintiff has explained how it arrived at the \$170,000 figure, Summary Judgment Opposition at 12 n.7. The remainder of the defendant's brief argument on this issue goes to the weight of the evidence rather than its admissibility. The defendant is not entitled to summary judgment on the basis of lack of evidence of proximate cause or damages with respect to the 1999 review.

#### **IV. Conclusion**

For the foregoing reasons, the defendant's motion to exclude portions of the proposed testimony of Conrad A. Kappel is **DENIED**. Those portions of the parties' motions to strike included in their respective statements of material facts and responses thereto not specifically mentioned in this opinion are **MOOT**. Finally, I recommend that the defendant's motion for partial summary judgment be **GRANTED** as to any claims based on Bond No. SSB-214615 and otherwise **DENIED**.

#### **NOTICE**

*A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.*

*Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.*

Dated this 22nd day of May 2003.

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David M. Cohen  
United States Magistrate Judge

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